Supreme Court, U.S.
FILED

08-976 JAN 23 2009

OFFICE OF THE CLERK

No. _____

In the
**SUPREME COURT of the UNITED STATES**

MICHAEL M. KENNEDY,
Petitioner

v

GRATTAN TOWNSHIP, MICHIGAN,
et al, Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE 6TH CIRCUIT

# APPENDIX
&
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Michael M. Kennedy
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APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 07-1595

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed Mar 26, 2008 LEONARD GREEN, Clerk

MICHAEL M. KENNEDY
Plaintiff-Appellant,

v.

GRATTAN TOWNSHIP; LANA GREEN; DAVID MUNSON; RICHARD A. HERWEYER; PAUL KNOERL; DENNIS HEFFRON; ROSS LEISMAN; JAMES R. BROWN; MIKA. MEYERS, BECKETT & JONES PLC,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

ORDER

Before: KENNEDY, BATCHELDER, and GRIFFIN. Circuit Judges.

Michael M. Kennedy proceeding pro se appeals a district court judgment dismissing his civil rights complaint filed pursuant to 42 U.S.C. §§ 1983 and 1985. This case has been referred to a panel of the court pursuant to Rule 34(j)(1) Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Seeking monetary and declaratory relief, Kennedy sued Grattan Township (Grattan), Grattan officials (Lana Green, David Munson, Richard Herweyer, Paul Knoerl, and Dennis Heffron), state district judge Steven R. Servaas and attorneys Ross Leisman and James Brown and their law firm Mika, Meyers, Beckett & Jones (MMBJ). Kennedy alleged that he was "wrongfully charged and convicted" of violating a Grattan zoning ordinance. He argued that the ordinance had been repealed, and that Leisman and Brown knew or should have known that the ordinance was void or unconstitutional. He also claimed that: 1) all of the defendants conspired to violate his constitutional rights by "prosecuting" him pursuant to an invalid zoning ordinance; and 2) defendants Leisman, Brown, and MMBJ were not authorized to act as prosecutors.

Defendants Leisman, Brown, and MMBJ filed a motion to dismiss or for summary judgment. A magistrate judge filed a report recommending that the district court grant summary judgment in favor of the movants because they were entitled to prosecutorial immunity, and because Kennedy's claims had been litigated and rejected in the Michigan state courts and were therefore barred by the *Rooker-Feldman* doctrine and collateral estoppel. The magistrate judge also recommended that the district court grant the defendants' motion for attorneys fees. Thereafter, the remaining defendants filed a motion for summary judgment and a motion for attorneys fees. Over Kennedy's objections, the district court adopted the magistrate judge's recommendation, granted each of the defendants' motions for summary judgment dismissed Judge Servaas for lack of service of process, and granted the defendants' requests for attorneys fees. Kennedy has filed a timely appeal, essentially reasserting his claims. He requests oral argument in this appeal.

Upon review, we conclude that the district court properly granted summary judgment to the defendants. We review de novo a district court's grant of summary

judgment using the same test as used by the district court. *Lucas v. Monroe County*, 203 F.3d 964, 971 (6th Cir. 2000). Summary judgment is proper if no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.* The moving party has the burden of showing an absence of evidence to support the non-moving party's case. *Covington* v. *Knox County Sch. Sys.*, 205 F.3d 912, 914 (6th Cir. 2000). Once the moving party has met its burden of production, the non-moving party must come forward with significant probative evidence showing that a genuine issue exists for trial. *Id.*

The defendants met their initial burden of establishing that they were entitled to summary judgment. Each of the defendants was entitled to summary judgment on Kennedy's claims because the claims were precluded by Michigan's doctrine of res judicata. Federal courts must give the same preclusive effect to state court judgments as those judgments would receive in the courts of the rendering state. *See Migra v. Warren City Sch. Dist. Bd. Of Educ.*, 465 U.S. 75, 80-85 (1984). This principle applies to civil rights actions under 42 U-S.C. § 1983 with respect to issues actually litigated in the state courts, *see Allen v. McCurry*, 449 U.S. 90, 97-99 (1980), as well as those issues that were not raised but could have been litigated in the state court proceeding. *See Migra*, 465 U.S. at 84. Under Michigan's doctrine of res judicata, a subsequent legal action is barred if: 1) the first action was decided on the merits; 2) the matter contested in the second case was or could have been resolved in the first case; and 3) both actions involve the same parties or their privies. *See Smith, Hinchman and Gryli, Assocs,. Inc. v. Tassic*, 990 F.2d 256, 251-58 (6th Cir. 1993). Michigan has adopted the "broad" application of res judicata, which bars claims arising out of the same transaction that plaintiff could have brought but did not, as well as those questions that were actually litigated. *See Katt v. Dykhouse*, 983 F.2d 690, 693 (6th Cir. 1992).

In this case, the record reflects that Kennedy's

challenges to his prosecution for violating the zoning ordinance were fully litigated and rejected in the state courts. The Kent County Circuit Court concluded that the trial court's findings of fact were overwhelming, that the zoning enforcement officer had the authority under state law to issue a citation to Kennedy, and that the township attorneys had the authority to prosecute the civil action under Michigan law. The court also rejected Kennedy's motion for reconsideration concluding that the trial court's findings were not clearly erroneous; the ordinance had not been repealed; and the citation for violating the ordinance was properly signed and served as a sworn complaint. Kennedy is barred from raising his claims in federal court because be litigated them in the state courts, and because the District Court for Kent County rejected his claims.

Kennedy points out that not all of the defendants were parties to the state court action. However, under Michigan law where collateral estoppel is being used defensively, the mutuality requirement does not apply. *Monat v. State Farm Ins. Co.*, 611 N. W. 2d 843, 850 (Mich. 2004); *see also McCormick v. Braverman*, 451 F 3d 382, 391 (6th Cir. 2006). Because we have concluded that the district court properly granted summary [sic] on preclusion grounds, we need not address the court's discussion of the *Rooker-Feldman* doctrine.

In addition, the district court properly granted summary [sic] to the defendants on Kennedy's conspiracy claim. Such a claim requires a showing that the defendants engaged in a conspiracy to deprive a class of persons of the equal protection of the laws, and that the conspiracy was motivated by racial or some other-class-based animus. *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971); *Collyer v. Darling*. 98 F.3d 211, 233 (6th Cir. 1996). Kennedy failed to allege that he was discriminated against on the basis of any such class-based discriminatory animus.

The district court properly dismissed the complaint against Judge Servaas for lack of service of process. We

review a district court judgment dismissing a complaint for failure to effect timely service of process for an abuse of discretion. *See Byrd v. Stone*, 94 F.3d 217, 219 (6th Cir. 1996) (applying the former Rule 4(j); *cf. Rose* v. *Soc. Sec. Admin.*, No. 98-6491, 1999 WL 1253074, at **1 (6th Cir. 1999) (unpublished) (applying this standard to the current Rule 4(m). A district court abuses its discretion when it relies on clearly erroneous findings of fact or when it improperly applies the law or uses an erroneous legal standard. *See Romstadt v. Allstate Ins. Co.*, 59 F.3d 608, 615 (6th Cir. 1995). The time limit for service of process on an individual defendant is 120 days. *See* Fed. R. Civ. P. 4(m).

Here, a review of the record does not reflect that Judge Servaas had been served with process in compliance with Fed. R. Civ. P. 4(m). The 120-day period for service had passed and Kennedy failed to show good cause for the failure to achieve service. Thus, Judge Servaas was properly dismissed.

Finally, the district court did not abuse its discretion when it granted the defendants' motions for attorneys' fees. *See Tahfs v. Proctor*. 316 F.3d 584, 594 (6th Cir. 2003). Kennedy's liability for attorneys' fees arises from 42 U.S.C. § 1988, which provides that a district court has discretion to award attorneys' fees as part of the costs to the prevailing party. "An award of attorney fees against a losing plaintiff in a civil rights action "is an extreme sanction and must be limited to truly egregious cases of misconduct.'" *Riddle v. Egensperger*, 266 F.3d 542, 547 (6th Cir. 2001) (quoting *Jones* v. *The Continental Corp.*, 789 F2d 1225, 1232 (6th Cir. 1986). Accordingly, a prevailing defendant should recover only if the district court finds that the original complaint was frivolous, unreasonable, or without foundation. *Wayne v. Vill. of Sebring*, 36 F.3d 511, 530 (6th Cir. 1994).

In this case, the district court reviewed the plaintiffs complaint and concluded that awarding attorneys' fees to the defendants was appropriate, because Kennedy had a full and fair opportunity to litigate his claims in the state courts

and was attempting to use the federal court retaliate against anyone involved in the state court litigation. Because Kennedy's lawsuit is frivolous and without foundation, the district court did not abuse its discretion in granting the defendants' motion for attorneys fees.

Accordingly, we deny the request for oral argument and affirm the district court's judgment.

Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT
Leonard Green
Clerk

APPENDIX B

Case No. 07-1595

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

MICHAEL M. KENNEDY,
Plaintiff-Appellant

v.

GRATTAN TOWNSHIP; LANA GREEN; DAVID MUNSON; RICHARD A. HERWEYER; PAUL KNOERL; DENNIS HEFFRON; ROSS LEISMAN; JAMES R. BROWN; MIKA, MEYERS, BECKETT & JONES PLC
Defendants -Appellees

Upon consideration of the appellant's motion for an extension of time to file his appendix, it is ORDERED that the motion be and it-hereby is DENIED. The Court sua sponte waives the filing of a joint appendix, the Court will rely on the lower court record.

It is also ORDERED that the request to file a corrected and indexed appellant brief is DENIED.

Issued: February 07, 2008
ENTERED PURSUANT TO RULE 45(a),
RULES OF THE SIXTH CIRCUIT
Leonard Green, Clerk
/s/ ?_____

APPENDIX C
Case 1 :O6-cv-00657-RHB-JGS Document 40
Filed 04/10/2007

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVSION

MICHAEL M. KENNEDY,
Plaintiff,

v. Case No.1 :06-cv-657
Honorable Robert Holmes Bell

GRATTAN TOWNSHIP, et al.,
Defendants.

**OPINION**

Plaintiff, Michael M. Kennedy, brings this civil rights action against Grattan Township, officers and agents of the township, and state District Judge Steven R. Servaas pursuant to 42 U.S.C. §§ 1983 and 1985. The factual predicate for plaintiff's claims is an ordinance enforcement case brought in the 63rd District Court by Grattan Township to force plaintiff to remove thirty derelict vehicles from his property. Defendant Judge Servaas conducted a bench trial and ultimately entered judgment on behalf of the township and against plaintiff. The Kent County Circuit Court, Honorable James Redford, affirmed the district court judgment on direct appeal in two extensive written opinions. Thereafter, the Michigan Court of Appeals and Supreme Court denied leave to appeal.

Plaintiff initiated this action in September 2006, seeking an award of damages in the amount of $75,000 against all defendants, jointly and severally, in addition to an award of punitive damages and other relief. In addition to naming Judge Servaas and Grattan Township as defendants, plaintiff's *pro se* complaint named attorneys

Ross Leisman and James R. Brown, attorneys in the law firm of Mika, Meyers, Beckett & Jones, who acted as retained counsel for the township in the state court proceedings. The complaint also named members of the township board: Lana Green, Paul Knoerl, Dennis Heffron, and Richard Herweyer, a board member and township supervisor. Finally, the complaint named David Munson, an employee of the township.

The first defendants to respond to the complaint were Leisman, Brown, and Mika, Meyers, Beckett & Jones, retained township attorneys. Those defendants filed a motion for summary judgment, raising the defenses of prosecutorial immunity and collateral estoppel. The summary judgment motion also raised the *Rooker-Feldman* doctrine. By report and recommendation entered February 14, 2007 (docket # 25), Magistrate Judge Joseph G. Scoville recommended that the motion be granted and, further, that their motion for ari award of attorney's fees pursuant to 42 D.S.C. § 1988 be granted, on the ground that plaintiff's claims against the township's lawyers are "frivolous, unreasonable, and without foundation." After issuance of the report and recommendation, defendants Grattan Township and Lana Green, David Munson, Richard Herweyer, Paul Knoerl, and Dennis Heffron (hereinafter the "Township Defendants") filed their motion for summary judgment (docket # 26), seeking dismissal on the same grounds discussed in the report and recommendation, as well as the additional grounds of legislative immunity, federal qualified immunity, and state immunity, and a motion for attorney's fees (docket # 28). Plaintiff filed objections to the report and recommendation and, after being granted an extension of time by the magistrate judge to do so, a response to the dispositive motion of the Township Defendants. As the issues raised by the report and recommendation and the motion by the Township Defendants are substantially interrelated, the court will consider all such issues in a single opinion. The court must

grant *de novo* review to timely objections of the dispositive recommendations of a magistrate judge, FED. R. CIV. P. 72(b); the matters raised in the motion of the Township Defendants are governed by the familiar summary judgment standards summarized by the magistrate judge at pages 6 and 7 of the report and recommendation.

Background Facts

The essential facts are well-documented in the record and are not subject to dispute. Plaintiff owns real property situated within Grattan Township, Michigan. The township, represented by attorneys Leisman and Brown, began enforcement proceedings in the 63-1 District Court under the township's Uniform Ordinance no. 1, which regulates land use. The enforcement proceeding arose from the allegation that plaintiff was storing over thirty junk vehicles on his property, in violation of the ordinance. The enforcement proceeding was civil in nature. Defendant Steven Servaas, a state district judge, conducted a bench trial on September 12, 2002. On September 27, 2002, he entered an order finding plaintiff responsible for violating the ordinance. The court conducted a further hearing concerning remedy and entered judgment on October 10, 2002, ordering plaintiff to pay $1,000 in fines and costs and requiring him to comply with the ordinance. Judge Servaas later taxed attorney's fees against plaintiff in the amount of $5,000 arising from plaintiff's filing of frivolous pleadings and motions. The district court's orders were affirmed on direct review by the Kent County Circuit Court in two written opinions dated December 31, 2003, and March 15, 2004. In these opinions, Judge James Redford of the Kent County Circuit Court affirmed the district court's findings of fact, upheld the statutory authority of the zoning enforcement officer and the township attorneys, and rejected all of plaintiff's other legal and factual arguments. Both the Michigan Court of Appeals and Supreme Court denied discretionary review.

Plaintiff brought this civil rights action by filing a *pro se* complaint on September 11, 2006. Plaintiff's complaint names the township and its board and supervisor, as well as Judge Servaas and the township's attorneys. Plaintiff alleges that the ordinance was void and unconstitutional, that the ordinance was not properly enacted under state law, and that attorneys Leisman and Brown were not authorized to represent the township. Each of these claims were carefully analyzed and rejected in the appellate opinions of the Kent County Circuit Court. Additionally, plaintiff brings a claim under 42 U.S.C. § 1985 for conspiracy to violate his civil rights.

By report and recommendation entered February 14, 2007, Magistrate Judge Joseph G. Scoville recommended that the dispositive motion of attorneys Leisman and Brown be granted on the grounds of prosecutorial immunity, the *Rooker-Feldman* doctrine, and collateral estoppel. Plaintiff filed a timely objection to the report and recommendation. While the report and recommendation was pending, the Township Defendants moved for summary judgment incorporating the grounds set forth in the report and recommendation and raising the additional grounds of federal and state immunity. Plaintiff has now filed a response to that motion as well. On *de novo* review of all issues, the court concludes that all moving defendants are entitled to summary judgment. Additionally, the complaint against Judge Servaas will be dismissed for failure to make service within the time allowed by Fed. R. Civ. P. 4(m), and defendants' motions for the assessment of attorney's fees will be granted.

## Discussion

The thorough treatment by the magistrate judge of the issues in this case renders unnecessary a detailed reiteration of the legal principles governing this dispute. With regard to defendants Leisman, Brown, and Mika, Meyers, Beckett & Jones, PLC, the magistrate judge was

clearly correct in concluding that all damage claims against them are barred by the doctrine of prosecutorial immunity. Even though the district court action was a civil ordinance enforcement matter, the township's attorneys are entitled to absolute immunity, because their duties were functionally analogous to those of a prosecutor. *See Cooper* v. *Parish*, 203 F.3d 937, 947 (6th Cir. 2000). Plaintiff's state-law challenge to the authority of Leisman and Brown to act as township attorneys was specifically rejected by the Michigan circuit court.

Likewise, defendants are clearly entitled to the benefit of collateral estoppel arising from the judgments of the state courts. This court is required to give those judgments the same preclusive effects as do the Michigan courts. 28 U.S.C. § 1738. All of the legal and factual matters that plaintiff attempts to raise in the present action were raised and rejected in the state courts. Against this conclusion, plaintiff raises two meritless objections. First; he asserts that not all of the defendants in this case were technical parties in the state-court action. This, assertion is true, but irrelevant. Under Michigan law, where collateral estoppel is being used defensively, the mutuality requirement does not apply. *Monat* v. *State Farm Ins. Co.*, 677 N.W.2d 843, 850 (Mich. 2004). It is therefore not necessary that the defendants have been formal parties in the state district court case. Second, plaintiff argues that he did not have a full and fair opportunity to litigate these issues in the state courts. This assertion is belied by the state-court record now before this court, and especially by the careful analysis of Circuit Judge Redford.

The magistrate judge was likewise correct in concluding that the *Rooker-Feldman* doctrine bars all claims that arise from the district court judgment itself. Plaintiff's frontal attack on the judgment of the district court, his challenge to the order of the district court enforcing the township ordinance, and his objection to the imposition of fines and attorney's fees all run afoul of the *Rooker-Feldman*

doctrine.

Finally, the court concludes that plaintiff has failed to state a claim for conspiracy under 42 U.S.C. § 1985. In count 2 of the complaint, plaintiff alleges that all defendants conspired with each other to prosecute and convict plaintiff without a valid ordinance and to deprive him of money and property rights, in violation of 42 U.S.C. § 1985(3). In order to state a claim under this statute, a plaintiff must allege a conspiracy designed to deprive a person or class of persons of the equal protection of the laws. This requires a showing that the conspiracy was motivated by racial, or perhaps some other class-based, discriminatory animus. *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971). Plaintiff has not alleged any such class-based animus. The Sixth Circuit has squarely held that landowners challenging land use regulation are not an adequate class for purposes of section 1985. *Seguin v. City of Sterling Heights*, 968 F.2d 584, 590 (6th Cir. 1992).

For the foregoing reasons, the court finds that defendants are entitled to judgment on all claims in plaintiff's complaint. As the foregoing reasons are adequate to support the entry of judgment, the court need not reach the claims of federal and state immunity asserted by the Township Defendants.

The record shows that defendant Servaas was not served with process in this case. Plaintiff merely mailed him a proposed waiver of service pursuant to Fed. R. Civ. P. 4(d). (*See* Notice, docket # 15). The notice was never executed and returned, necessitating formal service of process. The record does not reflect that process has ever been served on Servaas, and the time for doing so under Rule 4(m) has expired. Although the court has discretion to extend this time for good cause shown, the court will not do so in this case, because a showing of good cause is not possible. It is patent from the face of the complaint that Judge Servaas has been sued because of his judicial rulings in the district court action in which he was trial judge.

Claims against him would therefore be barred by the doctrine of judicial immunity. As formal service would therefore be futile, the court will not extend the time for service, but will dismiss the case against Judge Servaas for lack of service under Rule 4(m).

Finally, the court concurs with the magistrate judge that this is one of those rare civil rights actions in which attorney's fees should be taxed against a plaintiff pursuant to 42 U.S.C. § 1988. Plaintiff is attempting to enlist the federal court as a bludgeon against his former adversaries in the district court action, as well as anyone remotely connected with enforcing the ordinance against him. Having been given a full and fair opportunity to litigate his claims in the state courts, plaintiff should not be allowed to continue litigating the same issues *ad infinitum*. The court agrees that his claims in the present case are frivolous, unreasonable, and without foundation and that an award of attorney's fees under section 1988 is proper. Defendants are directed to file detailed affidavits in support of their applications for attorney's fees within fourteen days of the entry of judgment. Plaintiff is granted seven days thereafter in which to file objections. After resolution of all objections, the court will enter a separate judgment for fees and costs.

## Conclusion

The motion of defendants Leisman, Brown, and Mika, Meyers, Beckett & Jones, PLC, for summary judgment (docket # 6) and of the Township Defendants for summary judgment (docket # 26) will be granted. Plaintiff's objections to the report and recommendation of the magistrate judge will be overruled, and the report and recommendation (docket # 25) will be adopted as the opinion of the court, as amplified herein. All claims against defendant Steven Servaas will be dismissed for failure to make service pursuant to Fed. R. Civ. P. 4(m). The motion of Leisman, Brown, and Mika, Meyers, Beckett & Jones, PLC (docket #

18) and of the township Defendants (docket # 28) for an award of attorney's fees will be granted, and a separate judgment will be entered after the court considers supporting and opposing affidavits relative thereto.
Date: April 10, 2007

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
CHIEF UNITED STATES DISTRICT JUDGE
Certified as true copy of an electronically filed document.
Ronald C. Weston Sr., Clerk, Date 4-11-07

APPENDIX D
Case 1:O6-cv-00657-RHB-JGS Document 41
Filed 04/10/2007

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICIDGAN
SOUTHERN DIVISION

MICHAEL M. KENNEDY,
Plaintiff,

v. Case No.1 :O6-cv-657
Honorable Robert Holmes Bell

GRATTAN TOWNSHIP, et al.,
Defendants.

JUDGMENT

In accordance with the opinion issued this date:

IT IS ORDERED that plaintiff's objections to the report and recommendation of the magistrate judge (docket # 32) are hereby OVERRULED, and the report and recommendation (docket # 25), as supplemented by the court's opinion, is ADOPTED as the opinion of the court.

IT IS FURTHER ORDERED that the motions for summary judgment of defendants Leisman, Brown, and Mika, Meyer, Beckett & Jones, PLC (docket # 6), and of defendants Grattan Township, Lana Green, David Munson, Richard A. Herweyer, Paul Knoerl, and Dennis Heffron (docket # 26) be and hereby are GRANTED, and judgment is entered in favor of all moving defendants and against plaintiff on all claims in plaintiff's complaint.

IT IS FURTHER ORDERED that defendant Steven Servaas is hereby DISMISSED from this action for failure to make service pursuant to Fed. R. Civ. P. 4(m).

IT IS FURTHER ORDERED that defendants' motions for attorney's fees (docket #' s 18, 28) be and hereby are

GRANTED. The moving defendants shall file detailed affidavits in support of their request for fees within fourteen days of the date of this judgment; plaintiff is granted seven days after service in which to file objections thereto. Thereafter, the court will enter a separate judgment for attorney's fees.

IT IS FURTHER ORDERED that defendants may tax their costs.

Date: April 10, 2007

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
CHIEF UNITED STATES DISTRICT JUDGE

Certified as a true copy of an electronically filed document.
Ronald C. Weston, Sr., Clerk. Dated 4-11-07

APPENDIX E

Case 1 :O6-cv-00657 -RHB-JGS Document 25
Filed 02/14/2007

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DMSION

MICHAEL M. KENNEDY,
Plaintiff,

v. Case No.1 :O6-cv-657
Honorable Robert Holmes Bell

GRATTAN TOWNSHIP, et al.,
Defendants.

**REPORT AND RECOMMENDATION**

This is a civil rights action brought by a *pro se* plaintiff pursuant to 42 U.S.C. §§ 1983 and 1985. Plaintiff's complaint arises from ordinance enforcement litigation commenced by defendant Grattan Township against plaintiff in the 63rd District Court. After a bench trial, the district court entered judgment on behalf of the township in 2002, requiring plaintiff to remove thirty "junk vehicles" from his property and fining him in the amount of $1,000 for violating a township ordinance. The district court's judgment was affirmed on direct appeal by the Kent County Circuit Court, and the Michigan Court of Appeals, Michigan Supreme Court, and Supreme Court of the United States all denied discretionary review.

Plaintiff initiated the present civil rights action against Grattan Township and several of its officers, including defendants Ross Leisman and James R. Brown. Leisman and Brown are members of the law firm Mika,

Meyers, Beckett & Jones (Mika, Meyers), which acted as township attorneys in prosecuting plaintiff for the civil ordinance violation in state district court. Plaintiff's complaint alleges that plaintiff was "wrongfully charged and convicted" for violating the township zoning ordinance. (Compl. at 2). He alleges that Leisman and Brown knew or should have known that the ordinance was void or unconstitutional, but nevertheless pursued charges against plaintiff. (*Id.* at 14, 18). He further alleges that they conspired with township board members and officials and with the presiding district judge in connection with their prosecution of the case. (*Id.* at 15, 16, 19, 20). The complaint alleges that defendant Mika, Meyers is vicariously liable for the wrongful conduct of its members. (*Id.* 21). On the basis of these factual allegations, plaintiff asserts four claims against defendants Leisman and Brown and their law firm. Count 1 asserts a claim pursuant to 42 U.S.C. § 1983 arising from defendants' prosecution of plaintiff "when they had no valid ordinance" and when they knew or should have known that the ordinance violated property rights protected by the United States Constitution. Count 2 sets forth a conspiracy charge pursuant to 42 U.S.C. § 1985(3) arising from the alleged prosecution and conviction of plaintiff pursuant to an invalid ordinance and the presentation of false and invalid evidence at trial. Count 5 purports to assert a due-process claim arising from the district court judgment, which plaintiff asserts was based on an invalid ordinance and violated his right to due process of law. Count 7 alleges that defendants Leisman and Brown were not authorized by the Constitution of the State of Michigan to act as prosecutors, that they were biased in favor of their employer, and that therefore their conduct in the state courts deprived him of due process of law. For relief,

plaintiff seeks an award of compensatory and punitive damages and declaratory and injunctive relief.

Presently pending before the court is a motion by defendants Leisman, Brown, and Mika, Meyers to dismiss the complaint, FED. R. CIV. P. 12(b)(6), or for summary judgment, FED. R. Civ. P. 56. (docket # 6). The motion seeks dismissal on a number of grounds, including prosecutorial immunity, collateral estoppel, and the *Rooker-Feldman* doctrine. Defendants also seek an award of attorney's fees pursuant to 42 U.S.C. § 1988. (docket # 18) By order of reference entered September 15, 2006 (docket # 2), Chief Judge Robert Holmes Bell referred this case to me for all pretrial purposes, including the submission of a report and recommendation on all dispositive matters pursuant to 28 U.S.C. § 636(b)(1)(B). Plaintiff has filed his response to defendants' motions. (docket #' s 19, 23). Upon review of the record, I conclude that the moving defendants are entitled to judgment in their favor as a matter of law, and should be awarded their attorney's fees. I therefore recommend that defendants' motions be granted.

**Proposed Findings of Fact**

All of the facts necessary for resolution of the pending motion are provided by the opinions and judgments of the state courts, of which this court may take judicial notice. Those opinions and orders are attached to defendants' brief in support of their motion for summary judgment. (docket # 7).

Plaintiff Michael M. Kennedy is the owner of real estate in Grattan Township, Michigan. The township initiated a civil ordinance enforcement action, *Township of Grattan v.Michael M. Kennedy*, case no. RO1AO119 in the 63rd District Court for violation of uniform ordinance no. 1, which prohibits, among other things, the storage or accumulation of inoperable or junked vehicles for more than 48 hours, unless done pursuant to permit. Defendant Steven Servaas, District Judge, presided over the proceedings, and

defendants Leisman and Brown acted as attorneys for the township pursuant to contract with their law firm, Mika, Meyers. Judge Servaas conducted a bench trial on September 12, 2002. On September 27, 2002, he entered an order finding plaintiff responsible for violating the ordinance. (Def. Ex. B). After a further hearing concerning remedy, Judge Servaas entered a judgment on October 10, 2002, ordering plaintiff to pay $1,000 in fines and costs and requiring him to bring his real property into compliance with the township ordinance. (Def. Ex. C). By subsequent order, Judge Servaas taxed attorney's fees against plaintiff in the amount of $5,000 for plaintiff's filing of frivolous pleadings and motions. (Def. Ex. D).

Plaintiff appealed as of right to the Kent County Circuit Court.[1] In his brief on appeal, plaintiff raised six substantive and procedural challenges to the district court judgment, each of which contained sub-arguments (*see* Def. Ex. L). By opinion and order entered December 31, 2003, Circuit Judge James R. Redford analyzed and rejected each of plaintiff's appellate arguments. In summary, Judge Redford found as follows:

(1) The evidence supporting the district court's findings of fact was "overwhelming." (Def. Ex. L, 2).

(2) Plaintiff did not establish his defense of preexisting, nonconforming use. (*Id.*,2-3).

(3) The zoning enforcement officer had authority under state law to issue the citation. (*Id.*, 3-5).

(4) The township attorneys had authority to prosecute the civil infraction actions against plaintiff pursuant to Mich. Comp. Laws § 41.187. (*Id.*,4).

(5) Plaintiff's motion to disqualify Judge Servaas was both untimely and frivolous. (*Id.*, 5).

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[1] Judgments of the Michigan district courts are reviewable on direct appeal in the state circuit court. MICH. CT. R. 7.101. Further review in the Michigan appellate system is available only by application for leave to appeal. MICH. CT. R. 7.203(B)(2), 7.301(A)(2).

(6) State law did not entitle plaintiff to trial by jury for an ordinance infraction proceeding. (*Id.*, 6).

The circuit therefore affirmed the district court's judgment.

Plaintiff filed a motion for reconsideration in the circuit court. By opinion and order issued March 15,2004, Judge Redford carefully analyzed and rejected each of plaintiff's asserted grounds, as follows:

(1) The trial court's findings of fact were not clearly erroneous. (Def Ex. F 1-2).

(2) The ordinance under which plaintiff was prosecuted had not been repealed under state law before the prosecution. (*Id.*, 2-3).

(3) The township's delay in responding to discovery requests did not provide a valid defense to the ordinance violation. (*Id.*, 3).

(4) Judge Servaas properly found plaintiff to be in direct contempt of court. (*Id.*, 3-4).

(5) The citation was properly signed and sworn to and served as a sworn complaint under state law. (*Id.*, 4).

(6) The assessment of $500 in fines and $500 in costs did not violate state law. (*Id.*, 5-6).

Plaintiff applied for leave to appeal to the Michigan Court of Appeals. By standard order entered August 19, 2004, the appellate court denied leave for lack of merit in the grounds presented. (Def. Ex. G). In a pattern now common to plaintiff's litigation behavior, plaintiff moved for reconsideration, which the court denied by standard order entered October 4, 2004. (Def. Ex. H).

Plaintiff applied for leave to appeal to the Michigan Court of Appeals. That court denied the application by standard order entered May 31, 2005. (Def. Ex. I). Plaintiff again moved for reconsideration, which was denied by the court by order entered August 30, 2005. (Def. Ex. J). The Supreme Court of the United States denied *certiorari* on

March 20, 2006. (Def. Ex. K)

This civil rights action followed.

**Applicable Standard**

Defendants have filed a hybrid motion to dismiss or for summary judgment. Motions to dismiss test the legal validity of a claim, and the court's analysis is limited to the well-pleaded allegations of the complaint. *See McCarthy v. Middle Tenn. Elec. Membership Corp.*, 466 F.3d 399, 405 (6th Cir. 2006). Defendant's motion goes far beyond the allegations of the complaint and relies on documents generated in the state courts. Although this court can take judicial notice of the records of the state courts, *see Lyons v. Stovall*, 188 F.3d 327, 332 n.3 (6th Cir. 1999); *St. Louis Baptist Temple. Inc. v. FDIC*, 605 F.2d 1169, 1172 (10th Cir. 1979), reliance on such material is inappropriate in adjudicating a motion to dismiss for failure to state a claim upon which relief can be granted. Defendants' motion is therefore considered as a motion for summary judgment under Rule 56, which allows reliance on matters outside the pleadings.

As the Sixth Circuit has noted, the federal courts have entered a "new era" in summary judgment practice. *In re Morris*, 260 F.3d 654, 665 (6th Cir. 2001); *Cox v. Kentucky Dep't of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995); *Street v. J. C. Bradford & Co.*, 886 F.2d 1472,1478-81 (6th Cir. 1989). While preserving the constitutional right of civil litigants to a trial on meritorious claims, the courts are now vigilant to weed out fanciful, malicious, and unsupported claims before trial. Summary judgment is appropriate when the record reveals that there are no issues as to any material fact in dispute and the moving party is entitled to judgment as a matter of law. FED. R. Civ. P. 56(c); *Tatis* v. *US Bancorp*, 473 F.3d 672, 675 (6th Cir. 2007) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). The standard for determining whether summary judgment is appropriate is "whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one

party must prevail as a matter of law.'" *See Young* v. *Township of Green Dale*, 471 F3d 674, 678 (6th Cir. 2006) (quoting *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. at 251-52); *see also Sommer* v. *Davis*, 317 F3d 686, 690 (6th Cir. 2003).

The court must consider all pleadings, depositions, affidavits, and admissions on file, and draw all justifiable inferences in favor of the party opposing the motion. *See Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Kellogg v. Sabhlok*, 471 F.3d 629, 631 (6th Cir. 2006). The party moving for summary judgment bears the initial burden of pointing out to the district court that there is an absence of evidence to support the nonmoving party's case, but need not support its motion with affidavits or other materials "negating" the opponent's claim. *Moore* v. *Philip Morris Companies, Inc.*, 8 F.3d 335, 339 (6th Cir. 1993). Once defendants show that "there is an absence of evidence to support the nonmoving party's case," plaintiff has the burden of coming forward with evidence raising a triable issue of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Audi AG* v. *D'Amato*, 469 F3d 534, 542 (6th Cir. 2006). To sustain this burden, plaintiff may not rest on the mere allegations of his pleadings. FED. R. Civ. P. 56(e); *Kessler* v. *Visteon Corp.*, 448 F.3d 326, 329 (6th Cir. 2006); *Skousen* v. *Brighton High Sch.*, 305 F 3d 520, 527-28 (6th Cir. 2002).

## Discussion

### I. Prosecutorial Immunity

Defendants Leisman, Brown, and Mika. Meyers have asserted the defense of prosecutorial immunity. Absolute prosecutorial immunity is a common-law doctrine that shields a prosecutor from liability under the federal civil rights laws. *See Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976). The Supreme Court has endorsed a "functional approach" for determining whether an official is entitled to absolute prosecutorial immunity, explaining that a court should look to the "nature of the function performed, not the identity of the actor who performed it." *Forrester* v. *White*,

484 U.S. 219, 229 (1988). The functional approach focuses on whether the prosecutor's activities are "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430. Those acts that occur in the course of the prosecutor's role as an advocate for the state, such as initiation of the judicial proceedings, trial preparation, and actual case presentation in court, are protected by absolute immunity. *See Skinner v. Govorchin*, 463 F.3d 518, 525 (6th Cir. 2006); *Ireland v. Tunis*, 113 F.3d 1435, 1444-45 (6th Cir. 1997). The Sixth Circuit has specifically held that attorneys for a municipality who pursue a civil action for public nuisance and ordinance violations are also entitled to absolute immunity "when their duties are functionally analogous to those of a prosecutor's regardless of whether those duties are performed in the course of a civil or criminal action." *Cooper v. Parrish*, 203 F.3d 937; 947 (6th Cir. 2000) (quoting *Shrob* v. *Catterson*, 948 F.2d 1402, 1411 (3d Cir. 1991)); *accord Smith v. Power*, 346 F.3d 740 (7th Cir. 2003) (assistant city attorney who initiated proceedings to demolish building under city building code entitled to prosecutorial immunity). "Indeed, as long as the prosecutors were functioning in an enforcement role and acting as advocates for the state in initiating and prosecuting judicial proceedings, they are entitled to an absolute immunity defense." *Cooper*, 203 F.3d at 947.

Applying the foregoing analysis, I conclude that the moving defendants are clearly entitled to the protection of prosecutorial immunity. Plaintiff's claims against the moving defendants all arise from allegations that they prosecuted him under an ordinance that they knew was invalid and that they presented false or incompetent evidence in support of the prosecution. The decision to prosecute or not prosecute, even if malicious, enjoys absolute immunity. *See Burns v. Reed*, 500 US 478, 492-93 (1991). Likewise, presentation of testimony in court, even if it is alleged to be false, is an activity intimately involved

with the judicial phase of the criminal process and therefore immune from suit. *Imbler*, 424 U.S. at 427 n. 27; *Grant v. Hollenbach*, 870 F.2d 1135, 1138 (6th Cir. 1989). Plaintiff is not aided by his allegations that the prosecutors acted with retaliatory motive or pursuant to a conspiracy. For purposes of applying the absolute immunity doctrine to the decision of a prosecutor to initiate charges, motive is immaterial. The immunity doctrine shields prosecutors even if they act "maliciously, unreasonably, without probable cause, or even on the basis of false testimony or evidence." *Smith*, 346 F.3d at 742 (quoting *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1238 (7th Cir. 1986).[2] The conspiracy allegations under 42 U.S.C. § 1985(3) do nothing to change this result, as a conspiracy under section 1985(3) must be based on racial or other class-based animus. *See Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971); *Peters v. Fair*, 427 F.3d 1035, 1038 (6th Cir. 2005). Plaintiff has not alleged racial or class-based animus, nor can he on the facts of this case.

In opposition to the invocation of prosecutorial immunity, plaintiff raises a number of state-law challenges to defendants' status as prosecutors. He asserts that the defendant attorneys "are not true prosecutors under the Constitution of the State of Michigan, attorney general's opinion, state laws and common law." (Brief at 3, docket #23). The short answer to this assertion is that the state courts have already considered and rejected the identical argument.

> "The defendant likewise alleges as error the manner in which the Township attorneys were given authority to prosecute civil infractions against the appellant. Under MCL 41.187 attorneys licensed to practice law may be hired by

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[2] Although it is not necessary to the resolution of the immunity issue, I note that the state circuit court rejected all of plaintiff's claims that the ordinance had been repealed or was otherwise defective under state law.

> municipalities to carry on their legal responsibilities. The Grattan Township did specifically that in their retention of the Mika, Meyers, Beckett & Jones firm and the attorney Ross Leisman. He was acting within the scope of his office and within the scope of the directions provided to him by the Township and his actions were lawful and consistent with the authority granted to the Township by the Statues [sic] of this State. This assignment of error is without merit." (Opinion of Circuit Court dated 12/31/03, Def. Ex. E, at 4).

This holding of state law was affirmed on appeal. The states are the final expositors of their own law. *See Mulaney v. Wilbur*, 421 U.S. 684, 691 (1975). This court must therefore reject plaintiff's state-law challenge to the status of defendants as appointed township attorneys for the purpose of enforcing ordinances.[3]

The moving defendants are clearly entitled to the protection of prosecutorial immunity, and plaintiff has not advanced any reason why the doctrine should not be applied in this case. I therefore conclude that all of plaintiff's claims against the moving defendants are barred by the doctrine of absolute prosecutorial immunity.

**II. Other Issues**

Recognition of the immunity defense is a complete bar to plaintiff's claims against Leisman, Brown, and Mika, Meyers renders unnecessary an extensive analysis of the remaining issues raised in their dispositive motion. Nevertheless, because the other defenses are so clearly meritorious, they deserve at least brief mention as alternative grounds for dismissal of certain claims.

First, to the extent that plaintiff complains of injury

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[3] Plaintiff also asserts that the statute authorizing the hiring of private counsel by townships, MICH. COMP. LAWS § 41.187, is somehow unconstitutional. This assertion is unsupported by any applicable authority and is frivolous.

inflicted directly by the judgment of the state courts, his claims are barred by the *Rooker-Feldman* doctrine. The *Rooker-Feldman* doctrine prevents the lower federal courts from exercising jurisdiction over cases brought by "state court losers" challenging "state court judgments rendered before the district court proceedings commenced." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). The doctrine applies when a plaintiff complains of injury from the state court judgment itself. *See Fieger* v. *Ferry*, 471 F.3d 637, 642-43 (6th Cir. 2006); *Coles* v. *Granville*, 448 F.3d 853, 858 (6th Cir. 2006); *see also Abbott v. Michigan*, No. 06-1434, ___ F.3d ___, 2007WL 135953 (6th Cir. Jan. 22, 2007). In the present case, at least some of plaintiff's claims (especially count 5) clearly arise from the district court judgment itself, which imposed injunctive and monetary relief against plaintiff. Indeed, plaintiff appears to especially challenge the imposition of attorney's fees against him in the district court. This was a quintessential judicial act, not the act of the attorneys representing the township. Consequently, plaintiff's claims against all defendants are barred to the extent he complains of injury from the state court judgment itself.

Furthermore, the doctrine of issue preclusion, or collateral estoppel, prevents plaintiff from relitigating issues that were finally determined in the Michigan state courts. A federal court must give a state court judgment the same preclusive effect it would have in the courts of the rendering state. 28 U.S.C. § 1738; *see McCormick v. Braverman*, 451 F 3d 382, 397 (6th Cir. 2006); *Dubuc* v. *Green Oak Twp.*, 312 F.3d 736, 744 (6th Cir. 2002). Until a Michigan judgment is set aside, it is valid and binding for all purposes and cannot be collaterally attacked. *Altman* v. *Nelson*, 495 N.W.2d 826, 829 (Mich. Ct. App. 1992). The Michigan courts give collateral estoppel effect to previous judgments where (1) a question essential to the judgment was actually litigated and determined by a valid and final judgment; (2) the same parties had a full and fair opportunity to litigate the issue;

and (3) there is mutuality of estoppel. *See Monat v. State Farm Ins. Co.*, 677 N.W.2d 843, 845-46 (Mich. 2004); *see also McCormick*, 451 F.3d at 397. However, where collateral estoppel is being used defensively, the mutuality requirement does *not* apply. "[W]e believe that the lack of mutuality of estoppel should not preclude the use of collateral estoppel when it is asserted defensively to prevent a party from relitigating an issue that such a party has already had a full and fair opportunity to litigate in a prior suit." 677 N.W.3d at 850; *see McCormick*, 451 F.3d at 398; *Gilbert v. Ferry*, 413 F.3d 578, 581 (6th Cir. 2005). In the present case, the two applicable elements of collateral estoppel are clearly present. Plaintiff had a full and fair opportunity to litigate all issues before the state district and circuit courts, which thoroughly analyzed and rejected each claim that he now attempts to raise in federal court. The Michigan courts would give preclusive effect to the previous judgment, and this court must do likewise.

In summary, the moving defendants are entitled to judgment on the basis of the *Rooker-Feldman* doctrine and collateral estoppel, in addition to the meritorious immunity defense.

**III. Award of Attorney's Fees**

Attorney's fees may be awarded to prevailing defendants in civil rights litigation under 42 U.S.C. § 1988 upon a finding that the suit is frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith. *Hughes* v. *Rowe*, 449 U.S. 5, 14 (1980); *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 421 (1978); *Wolfe* v. *Perry*, 412 F.3d 707, 720 (6th Cir. 2005); *N.E.* v. *Hedges*, 391 F.3d 832, 836 (6th Cir. 2004). The Supreme Court cautioned in *Christiansburg* that district courts should "resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable

or without foundation." *Christiansburg Garment Co.*, 434 U.S. at 421-22; *accord Riddle v. Egensperger*, 266 F.3d 542, 547 (6th Cir. 2001). The decision to grant fees for the defendant is discretionary with the trial judge, and is reviewed only for an abuse of discretion. *Riddle*, 266 F.3d at 547; *see Wayne* v. *Village of Sebring*, 36 F.3d 517, 530 (6th Cir. 1994).

In the vast majority of *pro se* civil rights cases, this court does not even consider an award of attorney's fees against a plaintiff under section 1988. *Pro se* litigants often advance unsupportable claims, usually because of ignorance of the law or confusion about the merits of their cause. A special case is presented, however, when a litigant who has been given a full and fair day in court in the state system files a civil rights action not only against his state-court opponent, but the state judge, the opposing attorneys, and anyone else remotely involved in the litigation. Such cases bear the earmarks of vindictiveness and malice, and cannot be explained by confusion over the merits of a cause. After all, the state courts have patiently explained to plaintiff why his claims lack merit under the law. Cases such as this present a special need for deterrence, lest the federal courts be used as instruments to "settle the score" by disappointed state-court litigants. In these cases, the mere dismissal of the action provides no deterrent effect and invites frivolous motions for reconsideration, baseless appeals, and yet further rounds of vindictive litigation.

As demonstrated in the foregoing sections, plaintiff's claims against the township's lawyers in the state-court case are barred by the doctrine of absolute immunity, the *Rooker-Feldman* doctrine, and collateral estoppel. These claims are, within the meaning of the Supreme Court's jurisprudence on attorney's fees under section 1988, "frivolous, unreasonable, and without foundation." Despite the clear holdings of the state courts, plaintiff seeks to relitigate *ad infinitum* his entitlement to keep junk cars on his real property, in violation of township ordinances. Such conduct must be deterred by the federal courts, and some

compensation should be afforded parties who are hailed into court to answer such frivolous claims.

I recommend that the moving defendants' motion for attorney's fees (docket # 18) under 42 U.S.C. § 1988 be granted and that the court find plaintiff liable for reasonable fees. The actual assessment of fees must await the presentation of an appropriate evidentiary record after the entry of judgment. *See* FED. R. Civ. P. 54(d)(2).

**Recommended Disposition**

For the foregoing reasons, I recommend that the motion of defendants Leisman, Brown, and Mika, Meyers for summary judgment (docket # 6) be granted and that judgment be entered against plaintiff on all claims asserted against those defendants. I further recommend that defendants' motion for attorney's fees (docket # 18) be granted and that plaintiff be found liable for reasonable attorney's fees expended in the defense of this matter under 42 U.S.C. § 1988.

Dated: February 14, 2007

/s/ Joseph G. Scoville
United States Magistrate Judge

**NOTICE TO PARTIES**

Any objections to this Report and Recommendation must be filed and served within ten days of service of this notice on you. 28 U.S.C. § 636(b)(I)(C); FED. R. CIV. P. 72(b). All objections and responses to objections are governed by W.D. MICH. LCivR 72.3(b). Failure to file timely objections may constitute a waiver of any further right of appeal. *See Thomas* v. *Am*, 474 U.S. 140 (1985); *Neuman* v. *Rivers*, 125 F.3d 315,322-23 (6th Cir.), *cert. denied*, 522 U.S. 1030 (1997); *United States* v. *Walters*, 638 F.2d 947 (6th Cir. 1981).

APPENDIX F

Document 21

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL M. KENNEDY,
Plaintiff,

v. Case No. 1:O6-cv-657
Honorable Robert Holmes Bell

GRATTAN TOWNSHIP, et al.,
Defendants.

MEMORANDUM OPINION

This is a civil rights action brought by a *pro se* plaintiff pursuant to 42 U.S.C. §§ 1983, 1985. The case arises from a civil ordinance enforcement action brought by defendant Grattan Township against plaintiff in the state district court involving zoning violations. Among other defendants, plaintiff has named attorneys Ross Leisman and James R. Brown, as well as their law firm Mika, Meyers, Beckett & Jones. Attorneys Leisman and Brown represented the township in the state trial court and in subsequent appellate proceedings. Leisman, Brown, and Mika, Meyers, Beckett & Jones have moved to dismiss the complaint or for summary judgment, asserting prosecutorial immunity and other defenses. By order entered December 26, 2006 (docket # 9), this court directed plaintiff to file his response no later than January 26, 2007.

Rather than filing a response to defendants' dispositive motion, on January 23, 2007, plaintiff filed "objections" to the limited time afforded to him to answer the motion and a motion to extend the time for discovery

and to answer. (docket # 19). Plaintiff's motion seeks time to complete discovery on certain alleged factual issues, including whether the moving defendants "are indeed prosecutors or fakes." By order of reference issued on September 15, 2006, Chief Judge Robert Holmes Bell referred all nondispositive pretrial matters to me for decision, pursuant to 28 U.S.C. § 636(b)(1)(A). Upon review of plaintiff's objections and motion to extend time, I find that he is not entitled to the relief sought.

A party opposing a motion for summary judgment has no absolute right to additional time for discovery. *See Wallin v. Norman*, 317 F.3d 558, 564 (6th Cir. 2003); *Lewis v. A CB Business Servs., Inc.*, 135 F.3d 389, 409 (6th Cir. 1998). In order to invoke the court's discretion in this regard, a party opposing a motion for summary judgment must file a motion for additional time under Rule 56(f), which provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment and may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f). Rule 56(f), however, is "not a shield that can be raised to block a motion for summary judgment without even the slightest showing by the opposing party that his opposition is meritorious." *Lewis*, 135 F 3d at 409. Rather, the affidavit of the nonmoving party must show how postponement of a ruling on the motion will enable him to rebut the motion for summary judgment. *See Allen v. CSX Transp., Inc.*, 325 F.3d 768, 775 (6th Cir. 2003). It is incumbent upon the nonmoving party to include within the affidavit a description of the discovery needed and an affirmative demonstration of how this discovery will allow

the nonmoving party to rebut the motion. *See Abercrombie & Fitch Stores. Inc.* v. *American Eagle Outfitters, Inc.*, 280 F.3d 619, 627 (6th Cir. 2002).

Plaintiff has failed to meet the requirements of Rule 56(f). He has not filed an affidavit of any kind, as required by the rule. References in a brief to the need for more discovery do not qualify as a motion under Rule 56(f). *See Cacevic* v. *City of Hazel Park*, 226 F.3d 483) 489 (6th Cir. 2000); *State of California* v. *Campbell*, 138 F.3d 772, 779 (9th Cir. 1998). Furthermore, even if the court were to construe the statements in plaintiffs brief as a proper Rule 56 motion and affidavit, they would be insufficient.

The factual issues for which plaintiff asserts the need for discovery are not material to the outcome of this case. Plaintiff first asserts his need to conduct discovery on the question whether defendants Leisman and Brown were qualified to act as city attorneys. In support of this assertion, he relies on a 1914 opinion of the Michigan Attorney General, which opined that a municipal mayor could not appoint an attorney for the city who was not an elector of the city. A township's authority to hire a private attorney to prosecute ordinance violations, however, is conferred by MICH. COMP. LAWS § 41.817, which empowers the township board to employ an attorney to represent the township in civil and criminal matters involving violation of township ordinances. The statute imposes no residence qualification. Furthermore, on direct appeal of the district court judgment, the Kent County Circuit Court specifically found as a matter of state law that Mika, Meyers, Beckett & Jones was lawfully appointed to act as attorneys for the township (*see* Def. Ex. E at 4, appended to docket # 7). As this issue was actually litigated in the state courts, plaintiff is bound by the state-court judgment on this issue under the doctrine of collateral estoppel. *See Dubuc v. Green Oak Twp.*, 312 F.3d 736, 745 (6th Cir. 2003).

Plaintiff then asserts his belief that he was the victim of a conspiracy and retaliation in the state courts. He does

not identify, however, any item of discovery in connection with these claims that might be necessary for him to meet the pending dispositive motion, which does not challenge the evidentiary basis for plaintiff's claims, but only their legal sufficiency in light of the doctrine of prosecutorial immunity and the holdings of the state courts.

Finally, plaintiff asserts his belief that the law allows him the absolute right to discovery before a dispositive motion is decided. As noted above, however, a party opposing a motion for summary judgment has no absolute right to additional time for discovery. *Wallin*, 317 F.3d at 564. Rather, the party has an affirmative obligation to demonstrate to the court how discovery might enable him to demonstrate a material issue of fact relative to the issues raised in the dispositive motion. Plaintiff has utterly failed to do so in the present case.

Plaintiff waited until the eleventh hour before seeking an extension of time in which to respond to the summary judgment motion. This suggests a lack of diligence and a desire to delay a prompt decision on the issues raised in the dispositive motion. Plaintiff has not advanced any substantial reason for further delay in this matter. The court will indulgently grant plaintiff an extension of time until February 9, 2007, in which to file a response to the pending summary judgment motion. After that time, the motion will be considered ready for decision.

Dated: January 26, 2007

/s/ Joseph G. Scoville

United States Magistrate Judge

APPENDIX G
Case 1 :O6-cv-00657-RHB-JGS Document 22
Filed 01/26/2007

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL M. KENNEDY,
Plaintiff,

v. Case No. 1:O6-cv-657
Honorable Robert Holmes Bell

GRATTAN TOWNSHIP, et al.,
Defendants.

ORDER

In accordance with the memorandum opinion filed this date:

IT IS ORDERED that plaintiffs objection and motion to extend time for discovery and answer (docket # 19) be and hereby is DENIED.

IT IS FURTHER ORDERED that plaintiff shall file a response to the pending motion to dismiss or for summary judgment filed by defendants Leisman, Brown, and Mika, Meyers, Beckett & Jones no later than February 9,2007.

DONE AND ORDERED this 26th day of January, 2007.

/s/ Joseph G. Scoville United Stares Magistrate Judge

APPENDIX H

(WHICH ONE WAS THIS - NUMBER NOT ON TOP)(over 51

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL M. KENNEDY,
Plaintiff,

v. Case No.1 :O6-cv-657
Honorable Robert Holmes Bell

GRATTAN TOWNSHIP, et al.,
Defendants.

MEMORANDUM OPINION

By opinion and judgment entered April 10, 2007, this court granted judgment in favor of all moving defendants and determined that this was one of the rare civil rights actions in which taxation of attorney's fees against a plaintiff pursuant to 42 U.S.C. § 1988 was necessary as a deterrent against future litigation abuse. In accordance with the court's instructions, all moving defendants applied for attorney's fees. By report and recommendation entered May 15, 2007 (docket #51), the magistrate judge determined that the application of Attorney Craig Noland, on behalf of the Township defendants, was reasonable under the lodestar analysis endorsed by both the Supreme Court and the Sixth Circuit. The magistrate judge therefore recommended an award of fees to the Township defendants in the amount of $3,688.00. The magistrate judge conducted a detailed analysis of the application of attorney Ronald Redick, made

on behalf of the Mika, Meyers defendants, and found that the application was excessive in both hourly rate claimed and in the amount of time spent on the litigation. The magistrate judge recommended an award of statutory attorney's fees to the Mika, Meyers defendants in the amount of $4,830.00, a significant reduction from the requested amount of $9,870.00. Neither moving defendant has objected to the report and recommendation, but plaintiff has lodged timely objections. This court reviews objections to the findings of a magistrate judge on dispositive matters *de novo*. FED. R. Civ. P. 72(b); 54(d)(2)(D).

Plaintiff does not object to the lodestar analysis conducted by the magistrate judge. Rather, he raises two essential objections. First, he asserts that attorney's fees should not be taxed because of his "limited ability to pay." (Objections, docket # 52, at 2). In support of this objection, he refers to his affidavit, which he claims establishes his inability to pay. The court has reviewed plaintiff's seventeen-page affidavit (docket # 49), which is principally devoted to a representation of the merits of his case. It is a gross misrepresentation to assert that the affidavit establishes plaintiff s indigence. In passing, plaintiff avers that he is 64 years of age (P 1). This allegation accepted as true, does not necessarily establish an inability to satisfy a judgment. The affidavit also discloses that plaintiff owns fifty acres of land and that he owns collectible cars. Plaintiff has failed to establish that the taxation of fees in this case would work a hardship on him. As a legal matter, a party's inability to pay is not a proper factor to consider in determining whether to award attorney's fees. See *Wolfe v. Perry*, 412 F.3d 707, 723-24 (6th Cir. 2006). A person's ability to pay may, however, be used as a factor to determine the size of the award. *Id.* at 724. In the present case, plaintiff has not presented this court with evidence sufficient to support a finding that an award of attorney's fees totaling less than $9,000.00 would subject him to financial ruin. Furthermore, even if the award of fees would create somewhat of a

hardship, that factor must be balanced against the clear need to deter plaintiff from relitigating his state-court zoning action *ad infinitum*. In the absence of a significant sanction, plaintiff will be undeterred from raising his frivolous arguments in future cases. In summary, after considering the sketchy financial information provided by plaintiff, the court determines that plaintiff has not established grounds for a reduction in the amount of the recommended award.

Plaintiff's second objection is merely a reiteration of the allegations already reviewed and rejected by this court. Plaintiff persists in accusing his opponents of making false statements to the state circuit court and with having *ex parte* conferences with the judge. He asserts that the defendants "used unethical and unconstitutional conduct to win the state case." (Objections at 2).

Obviously, plaintiff still has not absorbed the fundamental lesson of this case: state-court judgments are not subject to collateral attack on the basis of allegations of wrongdoing or unethical conduct by the loser's opponents. Rather than providing a ground for denying fees, plaintiff's persistence in raising meritless arguments underscores the need for deterrence in this case.

Having reviewed the report and recommendation *de novo*, the court concludes that the lodestar analysis performed by the magistrate judge is correct and should be affirmed. The court further concludes that plaintiff's objections to an award of attorney's fees, or to the amount thereof, are meritless. Judgment will therefore be entered on behalf of defendants in accordance with the report and recommendation.

Date: June 6, 2007

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX I

UNITED STATES
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL M. KENNEDY,
Plaintiff

v. Case No.1 :O6-cv-657
Honorable Robert Holmes Bell

GRATTAN TOWNSHIP, et al.,
Defendants.

JUDGMENT FOR ATTORNEY'S FEES

In accordance with the memorandum opinion issued this date:

IT IS HEREBY ORDERED that the report and recommendation of the magistrate judge (docket # 51), as amplified by the court's memorandum opinion, is hereby adopted as the opinion of the court and that plaintiff's objections thereto (docket # 52) are hereby OVERRULED.

IT IS FURTHER ORDERED that statutory attorney's fees are hereby taxed in favor of defendants Ross Leisman, James R. Brown, and Mika, Meyers, Beckett & Jones, PLC and against plaintiff in the amount of $4,830.00.

IT IS FURTHER ORDERED that statutory attorney's fees in the amount of $3,688.00 are hereby taxed in favor of defendants Grattan Township, Lana Green, David Munson, Richard A. Herweyer, Paul Knoerl, and Dennis Heffron.

Date: June 6, 2007
/s/ Robert Holmes Bell.
ROBERT HOLMES BELL
CHIEF UNITED STATES DISTRICT JUDGE

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Ronald C. Weston, Sr. Clerk, 6-6-07

APPENDIX J

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL M. KENNEDY,
Plaintiff,

v. Case No. 1 :O6-cv-657
Honorable Robert Holmes Bell

GRATTAN TOWNSHIP, et al.,
Defendants.

REPORT AND RECOMMENDATION ON PETITIONS FOR ATTORNEY'S FEES

This was a civil rights action brought by a *pro se* litigant disappointed with the result obtained in a state-court ordinance enforcement action. By opinion and judgment entered April 10, 2007, Chief Judge Robert Holmes Bell determined that all defendants were entitled to summary judgment. The court also determined that this case "is one of those rare civil rights actions from which attorney's fees should be taxed against a plaintiff pursuant to 42 U.S.C. § 1988." (Op. at 7, docket #40). The court directed defendants to file detailed affidavits in support of their applications for attorney's fees and granted plaintiff seven days thereafter in which to file objections. Judge Bell has referred all dispositive matters to me for the entry of a report and recommendation pursuant to 28 U.S.C. § 636(b)(l)(B). (Order of Reference, docket #2). Upon review of the record, I make the following recommendations concerning the amount of attorney's fees to be taxed in favor of defendants.

## Applicable Standard

Under 42 U.S.C. § 1988, in certain civil rights actions a district court may award a "prevailing party" reasonable attorney's fees as part of costs. *See Farrar v. Hobby*, 506 U.S. 103, 109 (1992). Attorney's fees may be awarded to prevailing defendants under section 1988 upon a finding that the suit was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith. *See Hughes v. Rowe*, 449 U.S. 5, 14 (1980). Judge Bell has already found that plaintiff's case was frivolous, unreasonable, and without foundation and has made the discretionary judgment to grant attorney's fees against the plaintiff, principally to deter him from attempting to relitigate the zoning action that was resolved against him in the state courts. Plaintiff's objections to the taxation of fees on the ground that they are unauthorized by law, unconstitutional, unfair and otherwise inappropriate (Objections at 1-2, docket # 46) are therefore irrelevant and not properly before the court. The only open issue is the amount of attorney's fees to be taxed.

Without question, defendants are the prevailing parties in this action. After the court determines that a party has prevailed within the meaning of section 1988 and that attorney's fees are appropriate, the court must determine a reasonable fee. *See Blum v. Stenson*, 465 U.S. 886, 893 (1984). A reasonable fee is one that is adequate to attract competent counsel but does not produce windfalls to attorneys. *Id.* at 897; *see Reed v. Rhodes*, 179 F.3d 453, 471 (6thCir. 1999). A federal court's analysis of reasonableness beings with a review of the "lodestar"; "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). In calculating a "reasonable hourly rate," the trial court should initially assess the prevailing market rate in the relevant community. *Blum*, 465 U.S. at 895. The prevailing market rate is "that rate which lawyers of comparable skill and

experience can reasonably expect to command within the venue of the court of record." *Adcock-Ladd* v. *Secretary of Treasury*, 227 F.3d 343, 350 (6th Cir. 2000). The court then applies the hourly rate to the number of hours reasonably expended in the litigation. In approaching this task, the court should eliminate hours that are excessive, redundant, or otherwise unnecessary. *Hensley*, 461 U.S. at 434. The burden is on the party seeking compensation to document the number of hours reasonably spent on the case. *Moore* v. *Freeman*, 355 F.3d 558, 566 (6th Cir. 2004).

The Fee Applications

Attorney Ronald Redick of the firm of Mika, Meyers, Beckett & Jones, PLC, has applied. for fees in the total amount of $9,870.00, representing the expenditure of 42 hours at $235.00 per hour. Mr. Redick represents defendants Ross Leisman, James R. Brown, and Mika, Meyers, Beckett & Jones, PLC ("the Mika Meyers defendants") in this case. Attorney Craig R. Noland, representing the Township Defendants (Grattan Township, Lana Green, David Munson, Richard A. Herweyer, Paul Knoerl and Dennis Heffron), has applied for fees in the amount of $3,688.00, representing 24.5 hours at $145.00 or $155.00 per hour. Plaintiff challenges both of these fee requests as excessive and unreasonable.

A. Redick Application

I find that the application for fees by Attorney Ronald Redick is excessive in both the hourly rate claimed and the amount of time spent on the litigation. Mr. Redick has been engaged in the practice of law for approximately seven years, having graduated from the Thomas M. Cooley Law School in the year 2000. His specialty is land use and environmental law.[4] His request for fees at the rate of

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[4] Mr. Redick's application also contains 3.2 hours of time

$235.00 per hour is supported by reference to his standard hourly rate, which he asserts is consistent with the 2003 Michigan State Bar Survey on the Economics of Law Practice. That survey presents a number of statistical findings that this court routinely uses as an aid in determining the reasonableness of requested attorney's fees. Few of these measures support a $235.00 hourly rate for defending this particular case in this particular jurisdiction. Exhibit 23 to the survey shows that the median billing rate for Grand Rapids is $175.00, with a $274.00 rate at the 95th percentile. Exhibit 24 shows that attorneys with between five and ten years experience in the "out-state" area had a $140.00 median hourly billing rate. For law firms with more than twenty attorneys, however this median increases to $173.00 per hour (Exhibit 25). The median hourly billing rate for attorneys in metropolitan areas other than Detroit was $165.00 in 2003, with a $278.00 rate being at the 95th percentile. (Appendix F). Exhibit 22 of the survey shows that the median hourly rate for "municipal/public entity law" is $175.00 per hour. The same table shows that the median rate for defense lawyers in non-personal injury cases was $215.00, with $325.00 lying at the 95th percentile.

In the experience of this court, defense of litigation brought by *pro se* plaintiffs against municipal defendants does not command a high hourly billing rate. Such work is often done on a contract or flat-fee basis by firms specializing in defense of municipalities. This work is very price-sensitive, as the defendants are generally spending public funds. Claims brought by *pro se* parties are often, although not always, meritless on their face and require no discovery and little legal research, as the defenses are patent. Often such claims are resolved by motion at the outset of the case, as was the circumstance here. The median

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expended by a person identified only by the initials NPJ. The record contains no information about this person, whose application for fees is, on this record, completely unsupported.

billing rate of $175.00 applicable to municipal law matters is a much better indicator of the prevailing market rate than is the category applicable to non-personal injury defense, which includes complicated construction cases, legal malpractice actions, and other civil cases infinitely more complicated than the defense of *pro se* litigation. Although Mr. Redick's standard hourly rate of $235.00 is probably appropriate to zoning and other land-use matters where millions may be at stake, it is significantly out of line for defense of cases such as the present one. Furthermore, it is significant that Mr. Redick is a member of the Mika, Meyers firm. The firm was therefore representing itself in this litigation and there was no "client" to judge the reasonableness of attorney's fees. Consequently, although a private attorney's customary rates can be used to help calculate a reasonable fee award, *see Hadix v. Johnson*, 65 F .3d 532, 536 (6th Cir. 1995), that factor is of little weight here. For these reasons, I find that the claimed rate of $235.00 per hour is excessive in this case, and that a rate of $175.00 more accurately reflects the prevailing rate for like services in the Grand Rapids market.[5]

The time claimed for defense of this matter is also unreasonably high. Mr. Redick logged 34.3 hours over ten business days (December 11 through 22, 2006) in reviewing and analyzing the complaint, formulating defenses, doing legal research, and preparing a dispositive motion and supporting brief. In light of the fact that the Mika, Meyers firm prosecuted the underlying ordinance enforcement action in the state courts, it should have not taken any appreciable time to analyze the facts or assemble the attachments to the dispositive motion, which principally

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[5] Mr. Redick's application also contains 3.2 hours of time expended by a person identified only by the initials NPJ. The record contains no information about this person, whose application for fees is, on this record, completely unsupported.

consisted of papers and opinions filed in the state-court action. Likewise, analysis of the legal issues should not have been complicated. The defense of prosecutorial immunity was obvious, and the application of the *Rooker-Feldman* doctrine and the defense of collateral estoppel were likewise apparent. The result of this effort was a "motion to dismiss and/or motion for summary judgment," supported by a twenty-page brief. The motion was accompanied by Exhibits A through S, consisting principally of state-court pleadings, briefs, and orders from the underlying litigation. The briefing of some of the issues followed the arguments presented in the state-court litigation and therefore required no further research. The remainder of the brief presented well-settled federal law that should not have required extensive research or complicated analysis. It is difficult to discern why this task should have consumed 34.3 hours, or nearly a week's worth of effort. Approximately three eight-hour days should have been more than sufficient to assemble the factual record (already known to the Mika, Meyers firm), perform legal research, and draft the motion and brief. I therefore conclude that the 34.3 hours claimed for the period December 11 through December 22, 2006, should be reduced by 9.3 hours to 25 hours. Mr. Redick also claims 1.1 hour in reviewing plaintiff's response to the motion for summary judgment and 2.3 hours in reviewing and analyzing plaintiff's objections to the report and recommendation. Plaintiff's response to the dispositive motion (docket #23) was twelve pages in length. To the extent that it was intelligible, it added little to the analysis in this case. Importantly, the Mika, Meyers defendants chose not to file a reply brief. Review and analysis of this document should have taken no more than thirty minutes. Plaintiff's objection to the report and recommendation (docket #32) was eleven pages in length and again added nothing. The Mika, Meyers defendants did not respond, yet spent 2.3 hours analyzing this document. One hour would

have been more than sufficient.

For the reasons set forth above, I conclude that the 42 hours of attorney time claimed on behalf of the Mika, Meyers defendants is excessive and should be reduced as follows;

3.2 hours Time spent by unidentified attorney NPJ

9.3 hours Excessive time spent in researching and briefing summary judgment motion

1.9 hours Excessive time spent analyzing plaintiff's briefs

This leaves a total of 27.6 compensable hours. Multiplied by the reasonable hourly rate of $175.00, this yields a lodestar amount of $4,830.00.

Once the lodestar amount is determined, the district court may consider other factors, generally known as the "*Johnson* factors," after *Johnson v. Georgia Highway Express, Inc.*, 488 F .2d 714 (5th Cir. 1974). See *Hensley*, 461 U.S. at 434 n.9. As summarized by the Sixth Circuit, these factors are:

"(1) time and labor required; (2) the novelty and difficulty of the questions presented; (3) the skill needed to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time and limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in "similar cases." *Isabel v. City of Memphis*, 404 F.3d 404, 415 (6th Cir. 2005). The Supreme Court, however, has limited the application of the *Johnson* factors, noting that "many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." *Hensley*, 461 U.S. at 434 n.9; *see Geier v.*

*Sundquist*, 372 F.3d 784, 792-93 (6th Cir. 2004). Although an upward or downward adjustment to the lodestar amount is within the court's discretion in fare cases, *see Geier*, 372 F .3d at 793-94, I conclude that none of the *Johnson* factors warrants a modification of the lodestar. I have already considered many of these factors in calculating the lodestar itself, including the time and labor required, the novelty and difficulty of the questions presented, the skill needed to perform the legal services properly the customary fee, and the experience and ability of the attorney involved. The remaining factors do not, in my opinion, warrant a modification of the lodestar. In addition to seeking statutory attorney's fees the Mika, Meyers defendants seek $210.09 in costs, representing $174.75 in photocopy charges and $35.34 in LEXIS charges. In addition to statutory costs, section 1988 authorizes the court to award a prevailing party as an element of "reasonable attorney's fees" out-of-pocket expenses incurred by the attorney which would normally be charged to a fee-paying client in the course of providing legal services. *See Sigley v Kuhn*, Nos. 98-3977, 99-3531, 2000WL 145187, at * 9 (6th Cir. Jan. 31, 2000). Such costs include reasonable photocopying costs if properly supported. *Id.* Computer research costs mayor may not be compensable. The party seeking the award of costs has the burden of establishing "the precise basis for the charge" and of demonstrating "how the charges were reasonably related to the issues" in the case. *Auto Alliance Int 'I, Inc.* v. *U.S. Customs Serv.*, 155 Fed. App'x 226, 228-29 (6th Cir. 2005). Here, defendants merely listed the claimed items of cost, with no explanation whatsoever. These items should be disallowed.

In summary, with regard to the Mika, Meyers defendants, I recommend that statutory attorneys fees be taxed in the amount of $4,830.00.

B. Noland Application

Attorney Craig Noland, on behalf of the Township

defendants, has applied for fees in the amount of $3,688.00, representing 24.5 hours at $145.00 or $155.00 per hour. The Noland application raises none of the issues that led me to recommend a significant reduction of the Mika, Meyers fee application. Mr. Noland's hourly rate, principally $155.00 per hour, is at or below the prevailing rate charged in this community for similar defense work. The hours expended in drafting and briefing a dispositive motion were much more in line with that which one might reasonably expect an experienced attorney to invest in such a project. To be sure, by the time the Township defendants filed their motion, much of the analysis had already been done, as both the Mika, Meyers motion and the report and recommendation had been filed. This circumstance would naturally dictate the expenditure of fewer hours in briefing the same issues and, indeed, fewer hours were expended. The amount claimed is therefore at or below the lodestar amount for such services, and no *Johnson* factor creates a strong case for modifying the lodestar. Finally, the Township defendants have not sought the taxation of any costs.

Recommended Disposition

For the foregoing reasons, I recommend that statutory attorney's fees be taxed in favor of the Mika, Meyers defendants and against plaintiff in the amount of $4,830.00. I further recommend that statutory attorney's fees be taxed in favor of the Township defendants and against plaintiff in the amount of $3,688.00.

Dated: May 15, 2007

/s/ Joseph G. Scoville

NOTICE TO PARTIES

Any objections to this Report and Recommendation must be filed and served within ten days of service of this notice on you. 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72(b). All objections and responses to objections are governed by W.D. MICH. L Civ R 72.3(b). Failure to file timely objections may constitute a waiver of any further right of appeal. *See Thomas* v. *Am*, 474 U.S. 140 (1985); *Neuman v. Rivers*, 125 F.3d 315, 322-23 (6th Cir.), *cert. denied*, 522 U.S. 1030 (1997); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

APPENDIX K

Case 1 :06-cv-00657-RHB-JGS Document 9
Filed 12/26/2006

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL M. KENNEDY,
Plaintiff,

v. Case No.1 :06-cv-657
Honorable Robert Holmes Bell

GRATTAN TOWNSHIP, et al.,
Defendants.

ORDER REGARDING RESPONSE TO SUMMARY JUDGMENT MOTION

Defendants Ross Leisman, James R. Brown, and Mika, Meyers, Beckett & Jones have moved for summary judgment pursuant to FED. R. Civ. P. 56. Plaintiff is hereby notified of his opportunity to submit affidavits, documents, or other materials in opposition to the motion within 28 days of the date of this order, pursuant to W.D. MICH. L.Civ.R. 7.2(c). After that time, the motion will be considered ready for decision.

DONE AND ORDERED this 26th day of December, 2006.

/s/ Joseph G. Scoville United States Magistrate Judge

APPENDIX L
No. 07-1595

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER Filed Aug. 26, 2008 LEONARD GREEN, Clerk,

MICHAEL M. KENNEDY
Plaintiff-Appellant,

v.

GRATTAN TOWNSHIP,
Defendants-Appellees.

BEFORE: KENNEDY, BATCHELDER, and GRIFFIN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case.

Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
Leonard Green Clerk

APPENDIX M

Supreme Court of the United States
Office of the Clerk
Washington DC 20543-0001
William K. Suter, Clerk of the Court

Re:
Michael M. Kennedy

v. Application No. 08-A-612

Grattan Township, et al.

Dear Mr. Kennedy:

The application for an extension within which to file a petition for writ of certiorari in the above entitled case has been presented to Justice Stevens, who on January 14, 2009, extended the time to and including January 23, 2009.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk
By /s/ Gail Johnson case analyst